Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 75-384

ATLANTIC MARINE, INC., and
ATLANTIC DRY DOCK CORPORATION,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

ATLANTIC MARINE INC., and
ATLANTIC DRY DOCK CORPORATION,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Atlantic Marine, Inc. and Atlantic Dry Dock Corporation, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered

on May 22, 1975.

OPINIONS BELOW

The per curiam decision of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, p. 1a) was rendered on April 30, 1975, and judgment was entered on May 22, 1975 (Appendix B, infra, p. 2a) enforcing a supplemental decision and order of the National Labor Relations Board. Petitioners' Petition for Rehearing was denied on June 26, 1975 (Appendix C, infra, p. 4a). The decision of the United States Court of Appeals for the Fifth Circuit is reported at 512 F.2d 1404.

The supplemental decision and order of the National Labor Relations Board (Appendix D, infra, p. 5a) is reported at 211 NLRB No. 42, 87 LRRM 1060.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit having been rendered on April 30, 1975, jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board can arbitrarily refuse an employer's request to allow an NLRB compliance officer to review his own investigative notes to refresh his exhausted recollection while being cross-examined by the employer at an NLRB backpay hearing.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, amendment V provides, in pertinent part:

> "No person shall be...deprived of life, liberty, or property without due process of law."

STATUTE INVOLVED

5 U.S.C. §556(d) provides, in pertinent part:

> "...A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

STATEMENT

On June 26, 27, and 28, 1973, a backpay hearing was held at Jacksonville, Florida, before an administrative law judge of the National Labor Relations Board (hereinafter referred to as the "Board") to determine how much, if any, backpay should be awarded three claimants. In a previous proceeding, the

Board had held that the three claimants had been improperly discharged by Petitioners (hereinafter referred to as the "Company").

At the backpay hearing, counsel for the Company established that two (2) Board compliance officers had investigated the case and prepared separate backpay specifications. The first compliance officer, Woodrow Strickland, computed the alleged backpay due the three claimants at $7,137.62, while the second compliance officer, Robert Morley, used a different method which resulted in an alleged backpay liability of $21,129.64 (compare R.Ex.14 with G.C. Ex.1[c]).[1/] It was the Company's position

1/"R.Ex.14" refers to Exhibit 14 introduced into evidence by the Company at the June 26, 27, and 28, 1973 backpay hearing and appearing at pp.630-635 of
(continued on next page)

at the backpay hearing, inter alia, that (1) the Board's second compliance officer, Mr. Morley, had conducted an incomplete investigation and had used an inaccurate method to compute the alleged backpay, and (2) the claimants had voluntarily refused reinstatement and settled their backpay claims, in writing, prior to the time the second compliance officer became involved in the case.

(footnote 1 continued) the Appendix submitted to United States Court of Appeals for the Fifth Circuit which the Company requested to be certified and transmitted to this Court pursuant to Rule 21 of the Rules of the Supreme Court of the United States."G.C. Ex. 1[c]" refers to Exhibit 1(c) entered into evidence by the Board's General Counsel at the backpay hearing, and appearing at pp. 510-520 of the Appendix. References to the transcript of the backpay hearing will be to "A. (followed by the appropriate page number of the Appendix)". Tr. pp.A 80-86 are contained in Appendix E, infra, p.11a.

When the Company's counsel began his cross-examination of the Board's second compliance officer at the backpay hearing the following exchange took place.

> "Q (By Mr. Clark) Mr. Morley, when did you begin investigating this case?
>
> Gee, I'd have to check my notes - probably four or five months prior to the preparation of the backpay spec, I would estimate.
>
> To get an accurate date I would have to --
>
> Do you have those notes with you?" (A. 80).

Thereupon, the Board's counsel objected to Mr. Morley's refreshing his memory from his own notes, stating that any testimony regarding said notes would not be admissible since the information contained in Morley's notes was "privileged". (A. 80-81).

Despite repeated attempts by the judge to characterize the Company's request as one for the Board's entire investigative file (A. 81-83, 88), the Company's simple request was that Mr. Morley have the opportunity to review his own notes, made at the time he investigated the case about which he was attempting to give testimony (A. 81-84).

At one point, Company's counsel stated to the judge:

> "Now, we have not asked to produce his entire file, but the notes that he is referring to that would refresh his recollection we want produced.
>
> I think it is very important in this case because we have two different compliance officers working on the case. Several different offers of reinstatement were made, one - they have introduced some documents showing subsequent offers to what we have alleged in our Answer, when Mr. Morley came on the scene. There were other offers we contend that were made and were valid prior to the time that Mr. Morley arrived.

> In order to connect up this evidence we need to get the date specified as to when he started the investigation, because that will pin down his actual knowledge, leaving it to Mr. Strickland to fill in the gaps when he initially started on the case." (A. 83-84).

Thereafter, the judge again characterized the Company's request as one for the production of the Board's investigative file, wherein the judge stated:

> JUDGE RICCI: "Hold it. What matters when he started? He testified about the procedure and the theory for why he selected this, why he selected that. This statement, that he doesn't remember when he started on this case, cannot be the 'Open Sesame' for producing his investigation file, if in fact the General Counsel is correct that it doesn't have to be produced.
>
> He had better be right; I rather think he is right." (A. 86).

Relying upon the Board counsel's claim of privilege, the judge denied the Company's request and compliance officer Morley was not allowed to refresh his exhausted recollection from his investigative notes.

REASON FOR GRANTING WRIT

This case deals with the scope of the Board's right to refuse to produce information under the broad claim of "privilege". While the Company concedes the fact that the contents of the Board's investigative files are not normally subject to discovery in an unfair labor practice proceeding, in the present case, the Company only requested that the Board compliance officer be allowed to refresh his recollection from the notes he made at the time he investigated the case about which he was giving sworn testimony.

A substantial body of law has developed among the United States courts of appeals holding that in order to insure a fair hearing, witnesses should be allowed to refresh exhausted recollec-

tions by referring to documents which might not ordinarily be admissible into evidence. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223 (5th Cir. 1973), cert. denied, 414 U.S. 882 (1973); United States v. Baratta, 397 F.2d.215 (2nd Cir. 1968), cert. denied, 393 U.S. 939 (1968); Kramer v. Commissioner of Internal Revenue, 389 F.2d. 236 (7th Cir. 1968); United States v. Tolbert, 367 F.2d. 778 (7th Cir. 1966); Thompson v. United States, 342 F.2d. 137 (5th Cir. 1965); NLRB v. Federal Dairy Co., 297 F.2d. 487 (1st Cir. 1962).

This Court has not, however, resolved the question whether witnesses should be allowed to use documents to refresh exhausted recollections when the documents might not be otherwise admissible. The Board, as this case shows, has expanded

the qualified privilege attached to its investigatory files so broadly that it even denies its own employees the use of their notes in order to give accurate testimony on crucial facts in Board hearings. Such hoarding of essential information denies employers their Fifth Amendment rights to due process of law, as well as their right to thoroughly cross-examine adverse witnesses and develop full and complete records at administrative hearings. 28 USC §556(d). The per curiam enforcement of the Board's order by the United States Court of Appeals for the Fifth Circuit failed to take proper cognizance of the seemingly well-established principle that meaningful cross-examination can be arbitrarily denied by a groundless refusal to allow witnesses

to refresh failing memories. The Fifth Circuit's decision is also contrary to the current trend toward the complete disclosure of information which in years past the Board has adamantly refused to release to employees. See, e.g., NLRB, et.al. v. Sears,Roebuck and Company, 95 S.Ct. 1504 (1975).[2]

The Board's broad claim of "privilege" should not be automatically upheld. No valid reason has been advanced why the Board cannot maintain the necessary confidentiality of its investigative files and still allow its own witnesses to review their prehearing notes or statements. Such procedure poses absolutely

2/ See also, Note, Developments Under the Freedom of Information Act - 1974, 1975 Duke L.J. 416, 449.

no threat to the qualified privilege which attaches to the Board's internal files. Rutter Rex Mfg.Co. v. NLRB, supra.

Nor is there any real danger that otherwise inadmissible evidence will be introduced under the guise of refreshing a witness's recollection. The trial judge has the power to properly supervise the use of prehearing statements to refresh a witness's recollection. See Thompson v. United States, supra. Certainly such danger did not exist in the present case since the witness who was denied the opportunity to refresh his recollection was the Board's own witness and employee.

CONCLUSION

By its Petition, the Company asks the Court to consider a matter which bears

directly upon the Company's rights to due process of law. The Board, by arbitarily denying its own witness access to the Board's investigation file for purposes of refreshing his recollection, has improperly denied the Company its right to fully and completely develop its case and make a complete record at the backpay hearing. Under the false guise of "privilege", the Board blatantly disregarded clear judicial precedent and denied the Company a fair hearing, and the Fifth Circuit was remiss for not so holding. For these reasons, the Company prays its Petition be granted.

Respectfully submitted,

Daniel R. Coffman, Jr.
Patrick D. Coleman

Coffman & Jones
Post Office Box 40089
Jacksonville, Florida 32203

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition For a Writ of Certiorari have been furnished to the following by United States air-mail this 5th day of September, 1975.

Solicitor General
Department of Justice
Washington, D.C. 20530

Elliott Moore, Esquire
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

_____
Attorney

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2917

NATIONAL LABOR REALTIONS BOARD,

Petitioner,

versus

ATLANTIC MARINE, INC., and
ATLANTIC DRYDOCK CORPORATION,

Respondents.

Application for Enforcement of an Order of the National Labor Relations Board
(Florida Case)

(April 30,1975)

Before GEWIN, DYER and ADAMS*, Circuit Judges.

PER CURIAM:

ENFORCED. See Local Rule 21.[1]

---

1. See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

---

*Of the Third Circuit, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. 74-2917

ATLANTIC MARINE, INC., and
ATLANTIC DRYDOCK CORPORATION,

Respondents.

FILED: May 22, 1975

J U D G M E N T

Before: GEWIN, DYER and ADAMS*, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain supplemental order issued by it against the Respondents, Atlantic Marine, Inc., and Atlantic Drydock Corporation, their officers, agents, successors, and assigns, on June 7,1974. The Court heard argument of respective counsel on April 16, 1975 and has considered the briefs and transcript of record filed in this cause. On April 30, 1975, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United

States Court of Appeals for the Fifth Circuit that the said supplemental order of the National Labor Relations Board in said proceeding be enforced and that Respondents, Atlantic Marine, Inc., and Atlantic Drydock Corporation, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said supplemental order contained.

ENTERED: May 22, 1975

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* Of the Third Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2917

FILED: June 26, 1975

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

ATLANTIC MARINE, INC., and
ATLANTIC DRYDOCK CORPORATION,

Respondents.

- - - - - - - - - - - -

Application for Enforcement of an Order of the National Labor Relations Board
(Florida Case)

- - - - - - - - - - - -

ON PETITION FOR REHEARING

(June 26, 1975)

Before GEWIN, DYER and ADAMS*,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

---

*Of the Third Circuit, sitting by designation.

APPENDIX D

211 NLRB NO. 42

MFJ
D--8787
Jacksonville, Fla.

FILED: June 12, 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLANTIC MARINE, INC., and
ATLANTIC DRYDOCK CORPORATION
and
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS. AFL--CIO

Case
12-CA-4891

SUPPLEMENTAL DECISION & ORDER

On October 29, 1971, the National Labor Relations Board issued a Decision and Order in the above-entitled case,[1] finding that the Respondents violated the National Labor Relations Act, as amended, and ordering the Respondents, inter alia, to make whole Condon Boggs, David Johnson, and Roy Potter for any loss of earnings they may have suffered because of the discrimination against them.

On April 30, 1973, the Regional Director for Region 12 issued a backpay specification and notice of hearing for the purpose of determining the amounts of backpay, if any, due and owing and making whole the said discriminatees,

Condon Boggs, David Johnson, and Roy Potter. Upon appropriate notice issued by the Regional Director, a hearing was held on June 26, 27, and 28, 1973, before Administrative Law Judge Thomas A. Ricci.

On August 15, 1973, the Administrative Law Judge issued the attached Decision in which he found that the claimants were entitled to the amounts of backpay therein set forth. Thereafter, the Respondents filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein to correct mathematical and other factual inadvertences:[2]

[1] Atlantic Marine, Inc., and Atlantic Drydock Corporation, 193 NLRB 1003.

[2] We correct the following inadvertent factual misstatements of the Administrative Law Judge which, however, have no effect on the backpay calculations: That for 9 weeks Boggs averaged less than 40 hours of work a week at U.S. Natural Resources, when in fact he (continued on next page).

1. We agree with the Administrative Law Judge's finding that an appropriate measure of the earnings of Condon Boggs would comprise the average of the earnings of his fellow welders, Anderson and Howard, but would exclude the average earnings of Hunter, found to be a supervisor in the earlier Board proceeding. In reviewing the Administrative Law Judge's computation of Boggs' backpay on the basis of this finding, however, we find that he has made certain inadvertent mathematical miscalculations, which we herein correct pursuant to the Appendix attached to this Decision. On the basis of our computation, we find that Condon Boggs is entitled to backpay in the amount of $7,528.36, instead of $8,758.38 as stated by the Administrative Law Judge.

[2] continued.
averaged less than 40 hours a week for 10 weeks; that Boggs worked overtime during 10 weeks at U.S. Natural Resources, when in fact he worked overtime for only 9 weeks; that Potter, rather than Boggs, was employed at U.S. Natural Resources; and that Boggs' hospitalization on December 21, 1970, and his inability to work for a month thereafter were due to a hernia operation.

2. Having reviewed the Administrative Law Judge's computation of the backpay due Roy Potter, we correct his inadvertent failure to find that Potter was hospitalized on October 15,1971, with a hernia condition which rendered him unable to work for a period of 6 weeks thereafter. Accordingly, and absent cogent evidence that Potter's disability was employment connected, we find that the sum of $1,717.21, representing Potter's potential earnings during the fourth quarter of 1971, but for his disability, should be deducted from the sum of $7,533.09. Accordingly, Potter's total backpay is $5,815.88.

3. In accord with our foregoing computations of the backpay due Boggs and Potter, we hereby strike the Administrative Law Judge's recommended Supplemental Order and substitute our own, as herein set forth:

SUPPLEMENTAL ORDER

It is hereby ordered that Atlantic Marine, Inc., and Atlantic Drydock Corporation, their officers, agents, successors, and assigns, shall pay to each of the individuals listed below the amounts set forth opposite their names, as follows: Condon Boggs---$7,528.36; David Johnson---$3,517.19; and Roy Potter---$5,815.88.

Dated, Washington, D.C. Jun 7 1974

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr. Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

Schedule of Backpay Due Condon Boggs

Calendar Quarter	Gross Backpay	Net Interim Earnings	Net Backpay
1970-III	$1,990.85	$1,735.07	$255.78
1970- IV	1,814.11	1,188.23	625.88
1971- I	1,827.89	894.78	933.11
1971- II	2,028.65	649.49	1,379.16
1971-III	1,520.01	2,073.02	--
1971- IV	2,122.31	1,298.10	824.21
1972- I	2,741.95	1,401.50	1,340.45
1972- II	2,675.49	1,084.25	1,591.24
1972-III	2,561.89	1,492.42	1,069.47
1972- IV	2,574.96	2,458.90	116.06
			$8,135.36

Less: gross backpay for period of hospitalization during 1970-IV and 1971-I 607.00

Total net backpay due Condon Boggs $7,528.36

APPENDIX E

(Tr.31) [App. pp.80]
Q. And, are all of those substitutions footnoted in the Backpay Specification?

A. They are.

MR. DONNELLY: Okay.

That's all.

CROSS EXAMINATION

Q. (By Mr. Clark) Mr. Morley, when did you begin investigating this case?

A. Gee, I'd have to check my notes -- probably four or five months prior to the preparation of the backpay spec, I would estimate.

To get an accurate date I would have to--

Q. Do you have those notes with you?

MR. DONNELLY: Your Honor, I'm going to object here first to Mr. Morley answering the question, on the grounds that whether he has notes regarding that matter or not, it is our position that any testimony with respect to those notes, which is obviously where we are going here, would not be admissible.

I'm sure that Mr. Morley has notes and computations that he had been mak-

ing throughout in order to arrive at the conclusions that he has reached here. But, it is going to be the position of the Regional Director that the entire backpay file, I'm sure, is nothing if it is not Mr. Morley's work in computing these figures, and it is the position of the

[Tr. 32]

Regional Director that that information is privileged, and Counsel for the Regional Director would object to testimony regarding those matters.

[App.81]

The fruits of any of his -- his labors are reflected in the Backpay Specification which is already in evidence; it is also unnecessary.

MR. CLARK: Your Honor, it was a very simple question: "When did you begin the investigation?"

And, he said, "I don't know, but if I could refer to my notes I could probably remember it."

JUDGE RICCI: I heard him say that.

THE WITNESS: Well, I can --

MR. CLARK: Well, it is our position that the Respondents are entitled to have these notes produced to refresh this witness' recollection.

It is the witness' own testimony that--

JUDGE RICCI: You mean just to get the date when he started to work on it?

MR. CLARK: Yes.

JUDGE RICCI: And, for that reason they have to give you all of his file?

MR. CLARK: The notes he is referring to.

I don't know which notes he has in mind.

JUDGE RICCI: Let's get to the -- well, are are you through?

MR. CLARK: Yes.

[Tr. 33]

This also will connect up to other parts of this case. As you saw here earlier there was another compliance officer involved in this case, and Mr. Morley it is our contention picked up the ball after it had already been carried to the 50 yard line.

[App.82]

JUDGE RICCI: Yes; well, the --

MR. CLARK: And, we --

JUDGE RICCI: It is a matter of substance.

Is the employer entitled to the investigation file in a backpay case?

MR. CLARK: We are not asking for --

JUDGE RICCI: That is how broad your request is of this man.

MR. CLARK: We are not asking for the entire --

JUDGE RICCI: Pardon?

MR. CLARK: We are not asking for the entire --

JUDGE RICCI: Yes, but Mr. Donnelly said it is practically that of the compliance officer, that is his job, that is what he does; that is what is in that file.

MR. DONNELLY: It is the same information requested in the subpoena.

JUDGE RICCI: Hold it -- precisely.

Now, the witness testified really what should have been put in a brief. He is justifying this approach; select three welders, see how much they earned during the two

[Tr. 34]

year period with this company. Joe, who was fired, was a welder; that is how much Joe would have earned -- the average of these three guys.

That is what the witness said. He is justifying this approach as a method of calculating backpay due by an employer; that is what is really saying.

[App.83]

Now, from this you ask him, "Let's look at your file, your work papers, your investigation."

Now, another thing comes to mind, because I have to think of substance. This specification in my hands states that from the company's records it appears that these three welders, these three carpenters and these three shipfitters during the successive quarters were paid so much money for working. This is information peculiarly within the knowledge of the company. If the General Counsel misstated it, all the company has to do is say, "Look; you made a mistake." They have the records.

Up to this point, I don't hear the company saying that there was a mistake as to how much these three carpenters and welders in fact earned.

With that, I don't know what cross examination of this man there could even be, let alone -- I see no basis for him having to produce anything from his file.

MR. CLARK: Your Honor, the witness testified that he did not remember when he started the investigation, that he

[Tr. 35]

might be able to remember if he referred to his notes.

JUDGE RICCI: I heard him.

MR. CLARK: Now, we have not asked to produce his entire file, but the notes that he is referring to that would refresh his recollection we want produced.

I think it is very important in this case because we have two different compliance officers working on the case. Several different offers of [App.84] reinstatement were made, one--they have introduced some documents showing subsequent offers to what we have alleged in our Answer, when Mr. Morley came on the scene. There were other offers we contend that were made and were valid prior to the time that Mr. Morley arrived.

In order to connect up this evidence we need to get the date specified as to when he started the investigation, because that will pin down his actual knowledge, leaving it to Mr. Strickland to fill in the gaps when he initially started on the case.

JUDGE RICCI: Oh, that is the other compliance officer?

MR. CLARK: The retired compliance officer.

JUDGE RICCI: I don't understand -- the company is going to prove various offers of reinstatement?

I'm here to listen to it all.

MR. DONNELLY: Your Honor, as I'm sure you well know, throughout the entire proceeding, since the issuance of the Board's Decision and Order in this case, we have made

[Tr. 36]

extreme efforts and attempts to settle it.

We have made, and we will --

JUDGE RICCI: All right.

Let's go back to whether you have to produce the documents or not.

MR. DONNELLY: Okay.

JUDGE RICCI: That is what we are talking about.

MR. DONNELLY: The point I'm making is that throughout this backpay period there have been -- and, as I'm sure the file reflects--[App.85] several--correspondence between the parties in this matter. It is the position of the General Counsel that it is not necessary to produce that or like correspondence because the --

JUDGE RICCI: You mean the company has it anyhow?

MR. DONNELLY: The company has anything -- has any of that correspondence, certainly; it has any offer that we would have made, obviously.

Any prior offer that we would have made would have been in their possession, if any such exists.

JUDGE RICCI: You left me behind.

Let me ask you this: The company asks

the compliance officer to produce records from his investigation file, and Mr. Clark quite candidly says that he also wants to see what there is in there about offers that may have been made, rejected, not made, when -- dates; he wants the investigation

[Tr. 37]

file; that is what he is asking for.

Is it your position that you don't have to produce it?

MR. DONNELLY: Yes, it is, Your Honor; that's correct.

JUDGE RICCI: I rather think you are right.

I think his is a good objection, Mr. Clark. That doesn't foreclose the company from offering any evidence at all as to offers rejected -- prior offers of reinstatement -- no preclusion on the company at all.

MR. CLARK: Your Honor, our position was that we did not want the investigative file produced, and that was not our request.

Mr. Morley testified that he had made some notes which would refresh his recollection as to when he began this investigation, and we merely want those notes produced.

[App.86]

Now, Mr. Morley --

THE WITNESS: I think I may have --

MR. DONNELLY: Wait a minute, Mr. Morley.

JUDGE RICCI: Yes, hold it.

MR. CLARK: I would like to ask Mr. Morley this.

Q. (By Mr. Clark) What notes are you referring to?

MR. DONNELLY: Now, I'll object on the same grounds.

JUDGE RICCI: Right.

MR. DONNELLY: We are getting into the same matter.

JUDGE RICCI: Hold it.

What matters when he started? He testified about the

[Tr. 38]

procedure and the theory for why he elected this, why he selected that. This statement, that he doesn't remember when he started on this case, cannot be the "Open Sesame" for producing his investigation file, if in fact the General Counsel is correct that it doesn't have to be produced.

He had better be right; I rather think he is right.

Supreme Court, U. S.
FILED
NOV 8 1975
MICHAEL RODAK, JR., CLERK

No. 75-384

In the Supreme Court of the United States

OCTOBER TERM, 1975

ATLANTIC MARINE, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-384

ATLANTIC MARINE, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In the underlying unfair labor practice case the Board found that Atlantic Marine, Inc. and Atlantic Drydock Corp. (the Company) had discriminatorily discharged three employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3) and (1). 193 NLRB 1003. Following a backpay hearing the Board determined the exact amounts of backpay owed the three employees and ordered the Company to pay them those amounts (211 NLRB No. 42; Pet. App. D, 5a-10a). The court of appeals enforced the order in a *per curiam* decision (512 F.2d 1404; Pet. App. A, 1a). The sole basis for the petition is the Company's contention that it was unable effectively to cross-examine Board compliance officer Morley at the backpay hearing because the Board refused to produce his notes, which are contained in its investigative files, for the purpose of

refreshing Morley's recollection as to the exact date when he entered the case (Pet. 3).[1] This contention was properly rejected by the Board and the court of appeals and does not warrant further review.

While the Fifth Circuit in *J.H. Rutter Rex Mfg. Co., Inc.* v. *National Labor Relations Board,* 473 F.2d 223, certiorari denied, 414 U.S. 822, held that production of Board investigatory files may be compelled to refresh a witness's recollection, that decision, principally relied upon by the Company, carefully circumscribes this limited exception to the recognized confidentiality of such files. The court emphasized in *Rutter Rex* that the company had there made a "clear showing * * * that production of the * * * file * * * might very well resolve a disputed material factual issue." 473 F.2d at 240.

Here, by contrast, the Company made no showing that Morley's testimony as to the exact date he began his investigation would have cast any light upon the validity of the reinstatement offers or the method for computing the backpay awards. To the contrary, the Company already knew that Morley had entered the case around November 1972 since Morley had testified that he began his investigation about "four or five months" before the April 1973 backpay specification was issued (A. 80).[2] Furthermore, Morley testified that, while he had discussed the

[1]The Company contended that Morley, who had replaced another compliance officer and had recomputed backpay at a higher amount, had conducted an incomplete investigation and had come into the case after the claimants had voluntarily refused reinstatement and settlement of their backpay claims (Pet. 6).

[2]"A." references are to the appendix in the court of appeals. A copy has been lodged with the Clerk.

reinstatement offers with the discriminatees, his knowledge of the offers came primarily from file reports of other Board agents who had investigated the offers before he was assigned to the case (A. 110-112). Thus, the exact date of his coming on the case was immaterial.

Moreover, although Company counsel cross-examined Morley regarding his computations, at no time did Morley indicate that reference to his investigative notes was necessary to refresh his recollection regarding his method for computing the backpay awards (A. 89-117). In these circumstances, the Company was not denied a fair hearing or due process by the Board's refusal to produce Morley's notes contained in its investigative files. Indeed, no useful purpose would have been served by their production (see Pet. App. E, 14a-15a).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1975.

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